FILED
MAY 29 1998
OFFICE OF THE CLERK

No. 97-1735

In The

Supreme Court of the United States

October Term, 1997

KIMBERLY RENDISH,

Petitioner,

vs.

CITY OF TACOMA; RAY C. CORPUS, City Manager for the City Manager for the City of Tacoma, in his individual capacity; ROBIN JENKINSON, City Attorney for the City of Tacoma, in her individual capacity; JOHN KOUKLIS, Chief Assistant City Attorney for the City of Tacoma, in his individual capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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16 pp

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OPINIONS AND ORDERS BELOW

Rendish v. City of Tacoma, 123 F.3d 1216 (9th Cir. 1997).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Procedural Background

The case at hand was initially filed by Petitioner, Kimberly Rendish ("Rendish"), in the United States District Court for the Western District of Washington at Tacoma on August 21, 1996. On September 2, 1996, Rendish filed a Motion for Preliminary Injunction Reinstating Petitioner to Employment and Prohibiting Retaliatory Adverse Action during the pendancy of this action. On October 10, 1996, the District Court denied Rendish's motion for preliminary injunctive relief and denied her Motion for Reconsideration on October 28, 1996. The District Court found that Rendish's likelihood of success on the merits was weak and that she had failed to establish non-economic damages.

Rendish filed a Notice of Appeal on October 25, 1996, appealing the District court's decision under 28 U.S.C. § 1292(a)(1). In spite of the interlocutory appeal, the case continued toward trial until a stay was issued by the District Court on November 12, 1997. The United States Court of Appeals for the Ninth Circuit, in a unanimous opinion, affirmed the decision of the District Court on August 20, 1997, holding the District Court correctly concluded that Rendish's showing of likelihood of success on the merits was not strong and that the District Court properly determined that Rendish had not adequately demonstrated irreparable injury. The United States Court of Appeals for the Ninth Circuit also determined that the District Court properly analyzed the case when it held that in order for Rendish to pursue her claim that she must show that her claim involves a matter of "public concern" and that the "public concern", on balance, outweighs the City's interest in maintaining an effective and efficient City Attorney's office. On August 29, 1997, Rendish filed a Petition for Rehearing

and Suggestion for Rehearing en banc with the United States Court of Appeals for the Ninth Circuit. Her Petition for Rehearing and Suggestion for Rehearing en banc was denied on January 26, 1998.

The instant case is scheduled for trial in the United State District Court for the Western District of Washington on December 28, 1998.

B. Factual Background

Rendish began her employment with the City of Tacoma as an intern while she was still attending law school. Following her graduation, in 1988, Rendish, in 1990, accepted a position with the City of Tacoma in the City Attorney's Office, Criminal Division, as an Assistant City Attorney I. On August 16, 1996, Rendish was terminated from her Assistant City Attorney I position because of her conduct which greatly compromised the effectiveness and efficiency of the delivery of services of the City Attorney's office.

The problems created by Rendish within the City Attorney's office stemmed from the disruption, loss of confidence and trust, internal scheduling difficulties, and supervisory obstacles created by a law suit filed on August 8, 1996, by Rendish, in the Superior Court for the State of Washington. In her suit, Rendish named as defendants, the City of Tacoma, her immediate supervisor, the City Attorney, the Chief Assistant City Attorney, a sitting Municipal Court judge, the immediate former City Attorney, and a former Assistant Attorney. Her suit, for a variety of reasons, compromised the effectiveness and efficiency of the City Attorney's Office, and undermined the trust and confidence necessary to effectively serve as an Assistant City Attorney. (DN 16 and 17).[1]

The proper functioning of the Criminal Division of the City Attorney's office requires that the attorneys work closely with one

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1. DN refers to the District Court docket number.

another, have confidence in one another's capabilities, freely exchange ideas and suggestions, fill in for one another with little notice, attend court in all Municipal courts, and cooperate with one another in a manner that promotes the objectives of the City Attorney's office. Rendish's suit undermined these objectives and reflected that Rendish had lost trust and confidence in the City Attorney and her supervising attorney. (DN 17).

Scheduling problems within the City Attorney's Office were created because Rendish sued a sitting Municipal Court Judge, Ralph Turco. (DN 16). Judge Turco presides over one of three Tacoma Municipal courts. Because Rendish filed suit against Judge Turco, Judge Turco would have been forced to recuse himself from any case that involved Rendish. This is the case because he must maintain the appearance of fairness within his court. It was thus impossible for him to preside over any matter directly or indirectly involving Rendish. (DN 14). The practical effect of this circumstance is to increase costs and compound scheduling and staffing problems in the City Attorney's Office: Rendish would be unable to appear in Judge Turco's courtroom as a regular part of her duties, she would be unable to assist on an emergency basis, and she would be unable to charge crimes as part of her regular duties. These are functions regularly required of Assistant City Attorneys in Rendish's position. There was no solution which would reasonably accommodate Rendish's continued employment with the City. (DN 16).

The effectiveness of the City Attorney's Office was greatly compromised because Rendish sued her immediate supervisor, the Chief Assistant City Attorney, and the City Attorney. Rendish's work performance for many years had been weak and at times unsatisfactory. (DN 15). The City Attorney's Office worked with Rendish over a number of years in an effort to

develop her lawyering skills and the type of collegial relationship necessary for effective and efficient operation. This was done despite serious performance problems of Rendish including several mistrials resulting from Rendish commenting on a criminal defendant's silence and her misrepresenting the disposition of a criminal matter to the victim of domestic violence and to her supervisor who internally investigated the matter. (DN 15). Even after Petitioner filed the state court action, the City placed Petitioner on a paid administrative leave. Nevertheless, her suit destroyed the trust and confidence between herself, the City Attorney and her immediate supervisor. (DN 17).

Supervision of Rendish by her immediate supervisor, Heidi Horst, would likely become more strained if not destroyed if Rendish were allowed to maintain her employment within the City Attorney's office. (DN 16). Prior to the initiation of the state court action, this relationship was marked by intimidation and defensiveness. The strained and intimidating relationship between Rendish and her immediate supervisor, Heidi Horst, is punctuated by the fact that, since 1993, Rendish insisted that her attorney be present during all of her performance reviews. It would be nearly impossible for Ms. Horst to effectively supervise or discipline Rendish when they are adversaries in a lawsuit in which Ms. Horst was a defendant. Ms. Horst justifiably believed that her ability to supervise Rendish was diminished once she became a defendant and her ability to give Rendish day to day instruction that Rendish would follow was adversely affected. She also noticed that after the suit was filed, attitudes among attorneys and staff in the City Attorney's Office were very strained. Through her own acts, she created a contentious, hostile, divisive, and intolerable working relationship between herself, her immediate supervisor, her co-workers and the City Attorney. She demeaned the integrity of the Office of the City Attorney. Her personal attack upon her supervisor and the City

Attorney undermined their authority and created a difficult obstacle for effective supervision. The close working relationship that must exist within the City Attorney's office was tenuous but manageable prior to Petitioner's initiating legal action. The relationship became untenable and unmanageable following the filing of the state court action. (DN 16).

Rendish was not terminated in retaliation for filing her state court action. Rendish was terminated because of the effect her state court action had on the operation of the City Attorney's office and its impact on the effective and efficient delivery of public services to the City of Tacoma. (DN 17).

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DID NOT ENTER A DECISION IN CONFLICT WITH DECISIONS OF ANOTHER UNITED STATES COURT OF APPEAL ON THE SAME IMPORTANT MATTER.

The United States Court of Appeals for the Ninth Circuit followed the majority line of reasoning in requiring Rendish to establish that her suit involved a matter of "public concern" as a necessary predicate to establishing a First Amendment right and that if her claim did involve a matter of "public concern" that it not be outweighed by contravening aspects of the conduct in question that reduce the effectiveness and efficiency of the delivery of governmental services. *See Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir. 1998); *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997); *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1226 (6th Cir. 1997), *cert denied*, __ U.S. __, 118 S. Ct. 164; *Graybo v. Indep. Sch. Dist. No. I-*

008, 86 F.3d 1166 (10th Cir. 1996) (unpublished; citation permissible under 10th Circuit rules); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2nd Cir. 1993), *cert denied*, 510 U.S. 865; *Hoffmann v. Mayor, Councilman and Citizens of City of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990); *Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-62 (7th Cir. 1988); *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 701 (5th Cir. 1985), *cert denied*, 474 U.S. 1101 (1986). The only circuit failing to require a showing of "public concern" when analyzing government employee claims that a government employer's adverse employment action is barred by the First Amendment is the Third Circuit. *See San Filippo v. Bongiovanni*, 30 F.3d 424, 436 (3rd Cir. 1994), *cert denied*, 513 U.S. 1082 (1995). It is doubtful that *San Filippo* has effect beyond its unique and complex procedural and factual circumstance.

The Ninth Circuit adheres to the clear majority of cases that have addressed issues similar to those presented in Rendish's petition. The approach adopted by the Ninth Circuit in *Rendish v. City of Tacoma, supra*, properly balances the individual employee's interest in airing matters of public concern versus the government employer's interest in maintaining the effective and efficient delivery of public services when the matters of public concern are disruptive or otherwise compromise the effective and efficient delivery of public services.

Whether the District Court, in the case at hand, properly denied Rendish's request for Preliminary Injunction, because she failed to carry her burden of proof, turns on facts specific to the case at hand and the unusual procedural posture of the case at hand. For example, at the District Court, the burden was on Rendish to produce sufficient evidence establishing her entitlement to a preliminary injunction. *American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1472

(9th Cir. 1985). Rendish's primary source of evidence at the District Court were her own affidavits which were vague and conclusory. Her affidavits did not offer a sufficient factual basis to support her motion, and her reliance on innuendo was rejected by the District Court and the United States Court of Appeals for the Ninth Circuit. Similarly, Rendish was unable to offer evidence of irreparable harm. Her only demonstrable injury was an economic injury. This finding is especially strong in light of the finding of both the District Court and the Ninth Circuit that the evidence supporting Rendish's claim on the merits was weak. While Rendish attempts to establish a split in authority, the better view is that the Third Circuit case of *San Filippo* is an aberrational case confined to the specific and unique fact pattern presented. As a result, there is little, if any, general national importance to warrant this court granting Certiorari. Rendish was unable to carry her burden of showing irreparable harm or success on the merits and was, therefore, denied her request for a Preliminary Injunction.

II.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED BY THE SUPREME COURT AND DID NOT DECIDE SUCH A MATTER IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THE SUPREME COURT.

The District Court, as affirmed by the Ninth Circuit, correctly decided the matter below. United States Supreme Court precedent was followed below and was not in conflict with relevant decisions of this Court, particularly the precedent set by *Connick v. Myers*, 461 U.S. 138 (1983); *Waters v. Churchill*, 511 U.S. 661 (1994); *Rankin v. McPherson*, 483 U.S. 378

(1987); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). This line of cases stands for the proposition that government, when acting as an employer, must be given greater deference when making employment decisions as distinguished from government acting as sovereign in dealing with matters involving an employee's claims that the employee's First Amendment rights were violated by the government employer. Accordingly, these cases hold, there must be within the analytical framework a mechanism established to allow a balancing of interests between the government's interest, as an employer, to deliver services in an efficient and effective manner versus the government employee's First Amendment rights in matters of "public concern". *See Connick v. Myers*, 461 U.S. at 142; *Pickering v. Bd. of Educ.*, 391 U.S. at 568. Rendish argues that the only restriction should be whether or not the lawsuit is frivolous. This is an insufficient safeguard and the District Court and Ninth Circuit Court of Appeals properly rejected this view. It is an inefficient use of judicial resources to review the instant matter which was correctly decided at both the District Court and Appellate levels.

III.

SEVERAL QUESTIONS RENDISH PRESENTS IN HER PETITION WERE NOT ADDRESSED BELOW AND THIS COURT SHOULD DECLINE TO ACCEPT SUCH QUESTIONS FOR REVIEW.

Several questions presented by Rendish's Petition were not addressed below. The Court should not accept these questions until the lower courts have had an opportunity to fully develop the issues involved, if at all. The following questions were not discussed or addressed below: whether curtailment of the right of access to courts . . . implicates not only a first amendment right but several other rights protected by the United States

Constitution and Bill of Rights; and, whether the issues broadly alleged in Petitioner's Complaint are issues of "extreme importance" or of "inherent public concern" to the extent that no distinction was made or hierarchy created regarding degrees of public concern.

The source of the right to access the courts, under present case law, arises under the First Amendment petition clause. *See McDonald v. Smith,* 472 U.S. 479, 482 (1985). The Ninth Circuit recognized this source. *Rendish v. City of Tacoma,* 123 F.3d at 1221. Rendish did not present as an issue on Appeal that the source of one's right to access the courts was from a source different from the first amendment, or that if the source of such right sprung from a different source, that a different analysis must follow. This Court should not accept for review, if at all, this issue as framed until the lower courts have had an opportunity to develop its analysis.

Beyond bare assertion, Rendish did not present as an issue on Appeal before the Ninth Circuit, the idea that there is a hierarchy of "public concern", or matters of "inherent public concern", and that if a pleading is characterized as falling into the category of higher public concern or inherent public concern, that no amount of disruption would justify termination under the *Pickering, Connick* balancing. This issue was not addressed by the Ninth Circuit or the District Court. Again, this Court should not accept this issue for review because it was not addressed below and because it necessarily involved an extensive factual analysis that has not occurred at the present stage of this litigation.

Other questions presented by Rendish should not be addressed by the Court because they are heavily dependent upon the particular facts of this case. Whether the trial court made the appropriate balancing under Ninth Circuit law to determine

whether Rendish suffered irreparable harm as a result of her termination, and was accordingly entitled to preliminary injunction, is an issue heavily fact laden and of interest only to the parties to this litigation. The District Court applied the appropriate legal framework in this regard and determined that Rendish had not carried her burdened of proving that there was either a strong likelihood of success on the merits and a possibility of irreparable injury or the existence of serious question on the merits and a balance of hardships tipping in her favor. *National Wildlife Federation v. Burlington Northern R.R., Inc.*, 23 F.3d 1508, 1510 (9th Cir. 1994). This finding was upheld on Appeal. *Rendish v. City of Tacoma, supra.* Rendish was unable to support her motion for a preliminary injunction with sufficient evidence entitling her to that relief (a preliminary injunction). The Ninth Circuit reviewed the district court's determination and agreed. Moreover, Rendish's entitlement to a preliminary injunction has little national importance justifying this Court's attention. Similarly, the District Court's determination of whether Rendish would prevail on the merits would turn on the heavily fact laden reasons for Rendish's termination and the facts which were presented to the District Court in conjunction with Rendish's Motion for Preliminary Injunction. These are not the types of issues this Court should review.

CONCLUSION

Rendish was not denied access to the courthouse. Rendish's ability to pursue her claims against Defendants has not been impaired by the Defendants. She has vigorously pursued her claims and appealed results with which she is dissatisfied. She has also failed to recognize that her conduct had disruptive consequences to the City Attorney's office. She fails to recognize the City Attorney's office has a responsibility to the citizens of the City of Tacoma to effectively and efficiently deliver services such as the effective prosecution of crimes occurring within the City. She fails to recognized that her conduct impaired the City's ability to accomplish this duty. She fails to understand that she does not have an absolute right to prosecute a suit no matter the consequences to her employer or the citizens her employer serves. The petition of Rendish should not be accepted by the Court.

Respectfully submitted,

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